SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 311

ROBERT SIDELL, MADELINE C. SIDELL, STANLEY SHOEMAKER, RICHARD BUSKER, *Petitioners,*

v.

EDWARD G. HILL, Regular Judge of the 26th Judicial District and Special Judge Designate of the 17th Judicial District, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Kentucky entered in the above-entitled case on May 11, 1962.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Kentucky (R. 56-63), printed in Appendix B hereto, *infra,* pp. 1a-10a, is reported in (Ky.) 357 S.W. 2d, 318.

JURISDICTION

The mandate of the Court of Appeals of the State of Kentucky was entered on May 11, 1962 (R. 64). The Supplemental Order holding that the Order of May 11, 1962, is not subject to rehearing or modification was entered on May 22, 1962, and dated May 25, 1962 (R. 65). The mandate and Supplemental Order are printed in Appendix B hereto, *infra,* pp. 10a-11a. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), since a right or privilege under the Constitution of the United States is specially claimed.

QUESTION PRESENTED

Has there been a denial of petitioners' rights to due process of law under the Fourteenth Amendment of the Constitution, where the Court of Appeals of Kentucky, under the circumstances of this case, prohibits a Special Judge, duly qualified and elected in accordance with statutory procedure governing the selection of a Special Judge upon disqualification of the Regular Judge, from sitting, and appoints a Special Judge of its own selection, in the absence of allegations or finding against the qualifications, integrity, or impartiality of the Special Judge?

STATUTES INVOLVED

The Constitutional provisions involved are United States Constitution, Amendment XIV, § 1 and Kentucky Constitution, § 110 and § 136. The statutory provision involved is K.R.S. 23.230. These Constitutional and statutory provisions are printed in Appendix A, *infra,* p. 1a.

STATEMENT

Petitioners were indicted by the Campbell County Special Grand Jury on September 13, 1961, being charged with certain violations of gambling and other laws. Several indictments were returned against the petitioners Robert and Madeline Sidell, charging the leasing or renting of a building alleged to have been used for gambling. Indictments were returned against the petitioners Shoemaker and Busker for alleged operating or conducting gambling operations and for doing business under an assumed name without filing the requisite certificate in the office of the Campbell County Clerk.

Upon the voluntary disqualification of the Judge to hear and determine motions and demurrers attacking the validity and sufficiency of the indictments returned against petitioners and others (R. 23), counsel below for petitioners, together with counsel for other persons against whom similar indictments had been returned, entered into a stipulation with the Commonwealth Attorney selecting the Honorable Louis Reuscher, a senior and respected member of the bar of the Campbell Circuit Court, to act as Special Judge for the purpose of hearing and determining all motions and demurrers directed to the several indictments (R. 24-26). Upon the basis of such stipulation, the Judge entered an order finding that Reuscher possessed all the legal qualifications necessary under the law and thereupon appointed said Reuscher as Special Judge and administered the Constitutional and statutory oaths as prescribed by law (R. 27). Thereafter, the Special Judge entered an order setting all pending motions for hearing on October 6, 1961 (R. 28).

Immediately thereafter, the Attorney General of the Commonwealth of Kentucky filed as an original action with the Court of Appeals of Kentucky a petition for a writ of prohibition, among other things, against Reuscher sitting as Special Judge in connection with all of the indictments returned by the Special Grand Jury on September 13, 1961, including the indictments returned against petitioners. On October 5, 1961, the Court below entered a temporary writ of prohibition (R. 29), which was made permanent by an order entered on November 1, 1961 (R. 30-31). The Opinion of the Court is printed in Appendix B hereto, *infra*, pp. 11a-12a (Concurring Opinion omitted). *Commonwealth ex rel. Breckinridge, Attorney General* v. *Wise* (Ky.) 351 S.W. 2d 493.

Numerous of the persons indicted, not including petitioners, sought to intervene in those proceedings, but all of such motions for intervention were denied by the Order of November 1, 1961. The Chief Justice of the Court below entered an order on November 6, 1961, designating the respondent herein to preside over the Campbell Circuit Court for the purpose of disposing of all of the cases, as specified in said order, including respondent's cases. (R. 15-19).

In this background, petitioners filed as an original action in the Court below a petition for a writ of prohibition against Judge Hill, seeking to prohibit him from proceeding further in the trial of the indictments relating to petitioners and requesting an order adjudging that Reuscher is the duly elected Special Judge of the Campbell Circuit Court (R. 2-14). On May 11, 1962, the Court below entered an order denying the petition for a writ of prohibition and accompanied said order with its Opinion (R. 56-65). *Sidell* v. *Hill*

(Ky.) 357 S.W. 2d 318. The Court below on its own motion entered a supplemental order on May 22, 1962, precluding rehearing or modification of the order of May 11 (R. 65). On May 28, 1962, petitioners filed a motion with the Court below for an order abating and staying the order of May 11, 1962, pending application to this Honorable Court for a writ of certiorari (R. 69), and this motion was overruled by order entered June 5, 1962 (R. 77). On June 4, 1962, petitioners filed an application for stay, which was denied by Mr. Justice Stewart on June 6, 1962.

How Federal Question Is Presented

In the petition for writ of prohibition, petitioners properly raised the federal question, as follows: (R. 10)

> "Therefore, your petitioners respectfully state that the appointment of Edward G. Hill, the respondent in this action, as Special Judge of the 17th Judicial District, Campbell Circuit Court, by the Chief Justice of this Court on November 6, 1961, was contrary to the general law of the Commonwealth of Kentucky relative to the election of special judges, and that this action deprives them of the right to be heard before a court of competent jurisdiction properly constituted, and deprives them of procedural and substantive rights secured to them by Section 11 of the Constitution of Kentucky, and the due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States of America."

The federal question was presented in substantially the same language in petitioners' memorandum supporting the petition for writ of prohibition (R. 40).

The court below did not consider or pass upon the federal question thus presented.

This case has its genesis in hearings held in Frankfort in July 1961, by a Special Commissioner appointed by the Governor to consider ouster charges against certain peace officers of Newport and Campbell County. As a consequence of allegations made at these hearings, the Honorable Ray L. Murphy, Presiding Judge of the Campbell Circuit Court, convened a special session of the Grand Jury on August 14, 1961, which returned numerous indictments, including indictments against the Mayor of the City of Newport, the City Manager, three City Commissioners, and eight police officers for conspiracy to obstruct public justice.

Although grand jury proceedings are required to be conducted in secrecy, the press and other communication media throughout the State almost daily featured reports of the work of the Special Grand Jury and the Newport cases have become a major state-wide political issue involving the prestige and political prospects of the incumbent state administration.

Such a situation imposes a great responsibility on the Courts to prevent the petitioners from becoming pawns in a political contest and to assure that the trials of petitioners shall be conducted with the impartiality and fair play embodied in the due process concept. The Court of Appeals of Kentucky has failed to discharge this great responsibility and, by its own admission, appears to have misconceived its function. The attitude of the Court below is disclosed in the closing paragraph of its Opinion, which states as follows: (R. 63)

> "Some situations are so bad that they cannot be cured by half-measures. *Serious and distressing faults in our judicial and social system invoke the exercise of full capacities of those who are charged*

> *with the duty of discovering and correcting them.* This Court could easily have avoided that responsibility by pursuing the well-worn fork of the road as paved by Section 136 of the Constitution and its enabling Act, KRS 23.230, and by ignoring the realities of the situation. We chose instead to follow the path marked by Section 110 of the Constitution." (Emphasis supplied).

It is, thus, clear that the Court below has abdicated its judicial role and construed its function in this case to be the discovery and correction of faults in the judicial and social system. The prohibition against the duly selected special Judge Reuscher, and the designation of the respondent as Special Judge is a tangible manifestation of this misconception of function and necessarily raises grave doubts that the petitioners will receive the fair and impartial trial guaranteed to them by the Fourteenth Amendment. When an appellate court construes its function to be the discovery and correction of faults in the judicial and social system, due process is likely to be the first victim of the crusade.

Moreover, the Opinion of the court below gives rise to substantial doubts as to its soundness. Under Section 136 of the Constitution of Kentucky, the power to designate the method of selection of special judges is delegated to the General Assembly. Section 136 of the Constitution of Kentucky provides in relevant part as follows:

> "Special judges; legislature to provide for.—The general assembly shall provide by law for holding circuit court when, from any cause, the judge shall fail to attend, or if in attendance, cannot properly preside."

In KRS 23.230, the Legislature has exercised its constitutional responsibility and has provided in paragraph (1) thereof as follows:

> "When, from any cause, a judge of any circuit court, whether of continuous session or terms, fails to attend, or being in attendance, cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit judge, or if either party files with the Clerk of the Court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may elect one of the attorneys of the court to preside on the trial or hear the application, or hold the court for the occasion.... Any special judge so selected shall have all the powers and be subject to all the responsibilities of the regular judge of the court."

Upon the voluntary disqualification of the regular Judge (R. 23), Reuscher was properly selected by the parties as Special Judge (R. 24-26) and was duly appointed (R. 27) and entered upon the discharge of his duties as Special Judge (R. 28).

The court below based its decision on Section 110 of the Kentucky Constitution, which provides in pertinent part, as follows:

> "Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

The Court below in effect held that Section 136 of the Constitution of Kentucky, which vests in the Legislature the power to provide for the method of selecting special judges, and the enabling legislation thereunder (KRS 23.230), constitute an infringement on the common law power of the Court. The Court of Appeals

of Kentucky, however, is itself a creature of the Constitution and, therefore, only has the powers therein delegated. The power to provide the method for selecting a special judge, upon the disqualification of the regular judge, has been lodged by the Constitution with the Legislature.

In the long history of Kentucky, there are no reported cases and no indications that the Court of Appeals heretofore has ever claimed that its supervisory power over inferior tribunals granted by Section 110 of the Constitution of Kentucky empowers that court to override the provisions of Section 136 of the Kentucky Constitution. The contrary appears to be the case. The Court of Appeals long ago held that KRS 23.230 is mandatory, and special judges must be selected as required by that Act, and not otherwise. *Dial* v. *Commonwealth,* 143 Ky. 118, 136 S.W. 139. In the later case of *Philpot* v. *Commonwealth,* 240 Ky. 289, 42 S.W. 2d 317, the Court of Appeals interpreted KRS 23.230 as follows:

> ". . . But where there is authority conferred by law for the selection of a special judge by agreement and there has been in fact a mutuality of consent to his acting, the court is properly constituted. . . . The power of the legislature to provide for the manner of selecting special judges can hardly be questioned. . . ."

Under subsection (2) of KRS 23.230, the Chief Justice of the Court of Appeals may not designate a special judge until the Clerk of the trial Court certifies the facts as to the existence of a vacancy. Subsection (2) provides as follows:

> "If the parties cannot agree upon an attorney as provided in subsection (1) of this section or if the

> regular judge determines that sufficient time is not available in which to ascertain if the parties can agree upon a member of the bar to act as judge, as provided in subsection (1) of this section, or if he determines that it is impracticable to attempt to obtain agreement because of the large number of parties to the action to be tried, or for any reason, the Clerk shall at once certify the facts to the Chief Justice of the Court of Appeals, who shall immediately designate a regular circuit judge, if one be available, and, if not, an attorney having the qualifications of a judge, to hold the court to try the action."

The Order of the Chief Justice designating the respondent as Special Judge (R. 15) on its face is erroneously predicated on the existence of a certificate from the Clerk of the trial Court. Such a certificate, however, has not been filed. This is established by a certificate of the Clerk of the Campbell Circuit Court (R. 20-22) which states, among other things, the following:

> "9. The affiant, as Clerk of the Campbell Circuit Court, hereby certifies that she has never, pursuant to KRS 23.230, or any other section of law, certified to the Chief Justice of the Court of Appeals of Kentucky, that the parties to the aforesaid actions cannot agree upon an attorney as provided by subsection (1) of KRS 23.230, but states affirmatively that, as aforesaid, the Commonwealth Attorney and the attorney representing the defendants in the above cases, did stipulate and agree upon Hon. Louis Reuscher as Special Judge in said cases for the purposes set forth in the stipulation referred to above and attached hereto as Exhibit B."

Even if it be assumed, *arguendo,* that the court below had the power to set aside the designation by the par-

ties of Reuscher and to appoint the respondent as Special Judge, there is no factual basis for such action. The Court below predicated its Opinion on the "disturbed" conditions in Campbell County (R. 60-61). The Court's Opinion stated "that there were few public officials charged with law enforcement in Campbell County who were not under close scrutiny during most of the year 1961", although the Court concedes that many of "the officials were completely absolved from even a suggestion of wrong doing, . . .". (R. 61).

The significant fact, however, is that Reuscher was not a public official and was not in any wise involved or implicated with the problems of law enforcement. Reuscher, as a matter of fact, is a respected senior member of the bar of the Campbell Circuit Court, fully qualified to serve as a Judge. No allegations were made in the case at bar, or in any of the related proceedings, against the integrity or qualifications of Reuscher, or that he had any interest of any kind in the defendants or the public officials charged with malfeasance, which would affect his impartiality. The Court below has made no adverse findings with respect to Reuscher. Under these circumstances, there is lacking the rational relationship between the facts and the conclusions of the Court required to clothe the action of the Court with that degree of reasonableness required by the concept of due process.

REASONS FOR GRANTING THE WRIT

1. The case presents an issue of importance under the Federal Constitution. A basic element of a fair trial is that there must be a competently constituted court. See *Scott* v. *McNeal*, 154 U.S. 34, 46; see also, *Rogers* v. *Peck*, 195 U.S. 425, 435. The observation

by Mr. Justice Douglas, that "it is the right of the accused to be tried by a regularly constituted court, not by a kangaroo court" succinctly states the federal issue presented. *Williams* v. *United States,* 341 U.S. 97, 101. In the *Scott* case, *supra,* at 46, the court stated as follows:

> "the words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; . . .' Pennoyer v. Neff, 95 U.S. 714, 733."

Certiorari has been granted by this Court for alleged denial of due process under the Fourteenth Amendment because of the manner in which the trial judge was designated. *Akins* v. *Texas,* 325 U.S. 398. Although upon review, the Court held on the facts of that case that there had been no infringement of federal rights, the case at bar is distinguishable on its facts and presents a case of infringement of federal rights.

In *Akins,* the Texas Constitution empowered the Governor to fill court vacancies occasioned by death. A statute of Texas provided for the assignment of a special judge by the Presiding Judge of a specified Judicial District to fill the vacancy caused by the death of the regularly chosen occupant. The trial judge had died, the Governor had failed to exercise his power of appointment, and the Presiding Judge appointed a Special Judge.

In *Akins*, the case, on this point, turned solely on the construction of the Texas statute providing for appointments by the Presiding Judge. The State Court held the statute constitutional on the grounds that the statute merely provided for the functioning of courts under assigned judges until the vacancy was filled by the Governor. On this basis for the decision, this Court concluded that no federal issue was involved.

In the case at bar, the situation is materially different. The Court below has removed a special judge, who had been duly selected and qualified, and replaced him with a special judge of the Court's own choice. This was done without any adverse allegations or findings with respect to the qualifications integrity, or ability of Reuscher to conduct a fair trial.

In view of the manifest and unavoidable political overtones of a case such as this, the switching of trial judges becomes a matter of grave concern and imperils the petitioners' rights to a fair trial. This Court has said that it has the duty to make its own independent examination of the record when Federal Constitutional deprivations are alleged and that it is not bound by the conclusions of the lower courts in such cases. *Napue* v. *Illinois*, 360 U.S. 264; *Niemotko* v. *Maryland*, 340 U.S. 268, 271; *Craig* v. *Harney*, 331 U.S. 367, 373-374. This case warrants such independent examination.

2. The issue presented in the case at bar is not of significance only for this case, or for Kentucky, but presents a problem of nationwide significance. Many states, as does Kentucky, have constitutional or legislative provisions governing the selection of special judges to try criminal proceedings in the event of the disqualification of the regular judge. Similarly, appel-

late courts generally have supervisory jurisdiction over inferior tribunals, either by constitutional or legislative provisions or by common law doctrines. If the doctrine of the case at bar were established there would be a dual but uncertain basis for the selection of special judges. Such an area of uncertainty would be an invitation to hand-pick judges for criminal trials of wide public interest. If the federal constitutional guarantee of due process of law is to be preserved in this area, this Court will have to supply essential constitutional guidelines not now existing.

The dearth of authority on this problem and the importance of the problem on a national basis commends this case to the Court for review.

3. The decision below appears to be in conflict with the principles constituting a fair trial enunciated over the years by this Court. It has, thus, been held, among others, that confessions obtained by duress, denial of right to counsel, exclusion from the jury panel of persons because of race or color are matters which deny those charged with crime of a fair trial. See *Haley* v. *Ohio*, 332 U.S. 596; *Malinski* v. *New York*, 324 U.S. 401; *Hawk* v. *Olson*, 326 U.S. 271; *Williams* v. *Kaiser*, 323 U.S. 471; *Ashcraft* v. *Tennessee*, 322 U.S. 143; *Chambers* v. *Florida*, 309 U.S. 227, 229; *Pierre* v. *Louisiana*, 306 U.S. 354, 358; *Norris* v. *Alabama*, 294 U.S. 587, 590. The judge is certainly as important to a fair trial as are the jury, the right to counsel, and protection against unlawful confessions. They all have in common the protection of the rights of the accused to a fair trial.

In the case at bar, the Court below, in a radical departure from precedent, has, in a case of state-wide

political significance, removed a duly selected special judge and replaced him with a special judge of its own choice in the absence of any disqualifying allegations or findings with respect to the special judge removed. Such a situation patently is characterized by that judicial arbitrariness, which deprives litigants of the fair trial guaranteed by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August , 1962